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No. 87-1259

In the
Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD J. KING,
PETITIONER,

v.

GLOBE NEWSPAPER COMPANY,
DAVID FARRELL, AND PAUL SZEP,
RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Response to Edward J. King's Petition for Writ of Certiorari

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Before announcing for re-election, Edward J. King, then Governor of Massachusetts, sued the Globe Newspaper Co. (the "Globe")[1] as a result of three cartoons, one satire, one

[1] The Globe Newspaper Company publishes *The Boston Globe* and *The Boston Sunday Globe*. It is a subsidiary of Affiliated Publications, Inc. The individual defendants were editorial cartoonist Paul Szep and columnists Robert L. Turner and David Farrell. Plaintiff Edward J. King was elected Governor in 1978 and served from 1979 through 1983. Sup. Ct. Rule 28.1.

editorial and two columns which were published during the course of his term.[2] The Supreme Judicial Court ("SJC") affirmed the entry of summary judgment as to six of the pieces, but reversed on the seventh. The SJC held that actual malice could be found despite the existence of a source (the State Treasurer) with a reputation for veracity.

On November 2, 1987, the Globe and David Farrell petitioned this Court for a writ of certiorari seeking review of the opinion of the SJC because the SJC effectively undermined *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), by holding that actual malice could be found despite a source whose "veracity and accuracy" the journalist had no reason to doubt. The Governor opposed the Globe's petition on or about December 17, 1987. On January 26, 1988, the Governor filed his own petition for certiorari (the "Governor's Petition"), seeking review of those portions of the opinion below which affirmed the grant of summary judgment dismissing his claims in connection with an editorial, editorial cartoon and political column. For reasons stated in the Globe's petition for certiorari, this Court ought to grant certiorari to review at least the issues raised by the Globe. The issues the Governor would have reviewed do not present substantial questions of federal law. Thus, while this Court should grant certiorari, the issues raised by the Governor need not be reached or may be summarily resolved. Sup. Ct. Rule 23.1.

Statement of the Case

A. *The November 22, 1981 Column*

The November 22, 1981 column, as was true of all of the challenged articles, dealt with the Governor's position and

[2] The cartoons and texts of the articles are appended to the SJC's decision and thus are included in Appendix A to the petition at pp. 19a-30a. They are collectively referred to herein as "articles."

actions in a public controversy. In late 1981, the Massachusetts legislature debated race track reform legislation. During the course of that debate, a dogtrack in Raynham, owned in part by one George Carney, sought additional racing dates. Exh. 7, Tab 22, Keelan Dep. 32-34.[3] A harness track in nearby Foxboro, owned in part by one Edward Keelan, opposed Raynham obtaining more dates in competition with Foxboro.[4] The bill enacted by the legislature gave Raynham additional dates.

The Governor and Keelan had had both a professional and personal relationship for a decade. Exh. 7, Tab 22, Keelan Dep. 22-25. K & S Building Associates, of which Keelan was a partner, owned a greyhound track in Plainfield, Connecticut. Exh. 7, Tab 10, Admissions Nos. 23, 27. In 1976, the Governor had assisted K & S in obtaining a construction loan, *id.* at Admission No. 30, and was paid a $50,000 finder's fee for his trouble. *Id.*, Admissions Nos. 36, 37. In 1976, the Governor's wife was a partner with Keelan and two other individuals

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[3] The summary judgment briefs and appendices filed in the trial court were designated as Exhibits 1-8 by the plaintiff-appellant in the SJC. References thereto will be cited as "Exh. , Tab " along with any other information required to make the reference clearer.

[4] Keelan testified as follows:

Q. It was important to you all at Foxboro to keep that. . . non-competition portion of existing law in place, wasn't it?

A. Right.

Q. Sunday night racing was an important night for racing at Foxboro, isn't that fair to say?

A. That is right, yes. . . .

Q. It was important to Foxboro to be in effect the only game in town on Sunday nights, isn't that right?

A. That is correct.

Exh. 7, Tab 22, Keelan Dep. 34-35.

in Casey Stables, which owned four race horses. Tab 10, Admission Nos. 54 and 56. Keelan contributed $1,400 or $1,500 to the Governor's campaign. Exh. 7, Tab 22, Keelan Dep. 83, 87.

After Keelan's legislative lobbying failed — he admitted to being up on the hill "on a daily basis" in the final stages of the bill's travel, *id.* at 37-38 — the Governor acted. He returned the bill to the legislature with the message that he would approve it only with three amendments, one of which would prevent Sunday night competition between Foxboro and Raynham. The Governor wrote: "The Racing Commissioners have unanimously informed me that head-to-head Sunday night competition with Raynham/Taunton would force Foxboro out of business within twelve months." Exh. 7, Tab 14, King Aff. ¶ 3, Ex. 1.

About that time, Frank Rich, a former special advisor to the Governor, told columnist Farrell that Rich's son had run into Keelan at the State House one Saturday and that Keelan claimed to have been there on numerous Saturdays to see the Governor.[5] Exh. 7, Tab 26, Rich Dep. 20, 25. Farrell had

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[5] Rich testified:

Q. Now, did you tell Mr. Farrell that you knew that Mr. Keelan came in regularly on Saturdays during that period to see the Governor?

A. I did.

Citations to the Joint Record Appendix filed in the SJC are cited as (R. .) (R. 685.)

Q. Now, when you learned from your son Christopher that he had seen Mr. Keelan in Governor King's office, you formed a conclusion in your own mind about what Mr. Keelan and Mr. King had been talking about. . . .

. . .

Q. And wasn't that conclusion that they had been discussing racing in a general sense?

A. I could see no other reason for Eddie Keelan to be in there.

. . .

been told by other officials, including the Senate President, that Keelan actively had been lobbying.[6] (R. 281-82).

On Sunday, November 22, 1981, the *Globe* published Farrell's column in the "Focus on Politics" section. It dealt with the Governor's relationship with an individual named Richard Thissen. In the column Farrell wrote that the Governor "manifests personal loyalty . . . toward associates. . . ." The next sentence is at issue: "Despite his close association with out-of-state dog racing promoter Eddie Keelan, King has made no secret of his efforts to do Keelan's bidding on legislation that would greatly benefit the harness track at Foxboro owned by Keelan and his partners."

B. *The "Billboard" Editorial and Cartoon*

On October 17, 1979, the *Globe* published an investigative story on the billboard industry. It reported, *inter alia*, that the administration was attempting to eliminate the Outdoor Advertising Board; that it was seeking "grandfather" status for billboards slated to be removed; and that the Governor had signed special legislation which allowed a sign at Brody Mountain ski resort to continue standing despite a court order to the contrary. Exh. 7, Tab 8. The article also reported that the bill-

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[5] *cont.*

Q. And do you recall whether or not you discussed that conclusion, at least, with Mr. Farrell when you told him about the incident concerning your son's encounter with Mr. Keelan in Governor King's office?

A. I don't know if we used the words specifically; but I think it permeated the air.

Exh. 7, Tab 26, Rich 36; R. 694. Rich said repeatedly he equated Keelan's visits to the Governor with racing legislation. Exh. 7, Tab 26, Rich 46, 57, 61, 62.

[6] The Governor claims that Keelan could not have been at the State House on a Saturday because his name does not appear on the sign-in log. Christopher Rich, himself a King appointee, testified that he and other individuals often visited the State House without signing in. Exh. 8, Tab 8.

board company (Ackerley Communications) which stood to benefit the most from the grandfathering effort, was, "a company whose friends contributed $7,000 to Governor Edward J. King's gubernatorial campaign last fall." *Id.* Neither the Governor nor anyone else ever filed a lawsuit challenging anything reported in the investigative article.

The next day, October 18, 1979, the *Globe* ran an editorial and cartoon. The editorial said that "just before the September primary, seven of [Ackerley's] executives (and their friends and relatives) discovered Edward J. King, at the time just an underdog candidate for Governor, and dropped $7,000 into his campaign treasury." The editorial continued: "And back out of the Beacon Hill closet come all the old games. A bill zips through the Legislature and into law with King's signature to allow a ski resort billboard to remain despite a court order."[7]

The cartoon depicted the Governor and his Transportation Secretary, Barry Locke, on an Ackerley billboard, each holding a bag with a dollar sign on it. Szep's billboard carried the message, "Ackerley billboards can put money in your pockets too!"[8]

Reasons the Issues Raised by the Governor Need Not Be Reviewed by This Court

Common to the articles is that they criticize the Governor's performance as Governor. In its decision affirming summary judgment on the column, editorial and cartoon, the SJC found each non-actionable as an expression of opinion. The SJC

[7] The Governor testified that he did not sign the special legislation, but supported it and permitted it to become law without his signature. *See* Massachusetts Constitution, Part II, Ch. I, § 1, Art. II; *see generally Opinion of the Justices*, 99 Mass. 636 (1868).

[8] Locke, a King appointee, subsequently (in 1981) was indicted for theft and bribery, convicted and sentenced. Exh. 7, Tab 24, King Dep. III 138; Tab 9, Int. No. 10.

recognized that citizens may debate, question, and impugn motives of elected officials. App. 8a, 12a. The SJC was correct in holding these pieces protected. Furthermore, because many of the issues raised by the Governor are questions of state law, or lack broad importance, they do not warrant review in this Court.

I. Petitioner Presents No Substantial Federal Questions Requiring Review of the SJC's Decision on the November 22, 1981 Column.

A. *There Was No Waiver of the Protection for Opinion.*

The Governor argues that the columnist "waived" First Amendment considerations by testifying that the statement that King made no secret of his efforts to do Keelan's bidding was "factual." *See* Governor's Petition at 11-13.

First, no case, federal or state, is cited for the proposition that judicial inquiry of whether a statement is to be deemed protected "opinion" is foreclosed because a writer testifies that he meant the statement to be accurate or "factual." No reason is suggested why the determination of which speech will be protected is a personal right which casually may be waived. What we are dealing with is a judicial inquiry into what type of protection, if any, should attach to particular speech.[9]

[9] Judicial determination of the protected status of speech follows the Court's practice of identifying "as a matter of constitutional law" expressions of "rhetorical hyperbole" and the "'loose language or undefined slogans that are part of the conventional give-and-take in our economic and political controversies.'" *See Greenbelt Cooperative Publishing Association* v. *Bresler*, 398 U.S. 6, 13-14 (1970); *National Association of Letter Carriers* v. *Austin*, 418 U.S. 264, 284 (1974), *quoting Cafeteria Employees Local 302* v. *Angelos*, 320 U.S. 293, 295 (1943). No less than with the actual malice rule, the importance of the First Amendment protection for opinions mandates that "judges . . . make sure that [the rule] is correctly applied." *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 502 (1984).

Second, the Governor has distorted the testimony of the columnist.[10] Farrell said that the statement was "fact and opinion." More importantly, read in context, Farrell simply was saying he believed what he wrote — hardly a "waiver" of constitutional protection.

Third, the issue is not waiver, as the Governor ultimately acknowledged. At most, Farrell's statement is some sort of admission: "An admission as to a libel defendant's state of mind or intent when writing an allegedly defamatory statement constitutes a binding admission." Governor's Petition at 12. The problem is that the effect to be given an admission in state court is a matter governed by the state's law of evidence. The Governor recognizes as much by citing a treatise on the Massachusetts law of evidence as the only support for his argument.[11] *Id.*

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[10] Farrell testified:

A. "King has made no secret of his efforts to do Keelan's bidding on the legislation that would greatly benefit the harness track at Foxborough owned by Keelan and his partners."

King has made no secret of his efforts to do Keelan's bidding, that's a fact.

Q. Then the words, "on the legislation"?

A. Well, yes, include that, too, "on the legislation."

Q. And "that would greatly benefit the harness track?"

A. "At Foxborough owned by Keelan and his partners?"

Q. That's a fact, too, isn't it?

A. *That's a fact and opinion.*

Q. Now, you say at the time you wrote it and at the time it was published, you believed the facts were true, right?

A. Yes.

Q. And you didn't have any doubt about them, is that right?

A. Yes.

R. 323-24. (Emphasis added.)

[11] Although the Governor presented his waiver argument both to the trial court and SJC, neither thought the argument worthy of discussion.

B. *The SJC's Interpretation of the Article at Issue Does Not Raise Any Issue Requiring Review by This Court.*

The Governor also strains to find an accusation of bribery in the criticism that he did an associate's "bidding." The Governor finds constitutional significance in whether the statement implies the existence of "undisclosed defamatory false 'facts'." Governor's Petition at 13.

First, the SJC surely was right when it concluded the article "makes no implication of corruption." App. 12a. The columnist cites personal *loyalty*, not venality, as the basis for the Governor's actions. Only the most tortured reading of the statement can produce the meaning of which the Governor complains.

Second, the dispute over how to interpret this column hardly rises to constitutional significance. Massachusetts follows standards laid down in such cases as *Smith* v. *Suburban Restaurants, Inc.*, 374 Mass. 528, 373 N.E.2d 215 (1978) and *Sharratt* v. *Housing Innovations, Inc.*, 365 Mass. 141, 310 N.E.2d 343 (1974). The SJC's refusal to twist the statement in the fashion suggested by the plaintiff is consistent with its long-settled rule that it will not "plac[e] a strained and unnatural construction on [a] writing to impute [a defamatory] meaning to it." *Tobin* v. *Boston Herald-Traveler Corp.*, 324 Mass. 478, 488, 87 N.E.2d 116, 121 (1949). The plaintiff cannot seriously contend that this Court need review the application of those well-established principles of state law to the facts of this case.

Even if interpretation of the challenged statement turned on federal law, a narrow question of how legal doctrine applies to particular facts would not warrant certiorari. *See, e.g., NLRB* v. *Hendricks County Rural Electric Corp.*, 454 U.S. 170, 177 n.8 (1981) (cross petition for certiorari presenting a question of fact "does not merit Court review.") Consideration of hidden meanings in the charge that a Governor does the "bidding" of an

associate is unlikely to supply useful guidance to the lower courts in future cases. Questions as fact-specific as the meaning of particular words lack the wide-ranging impact or general relevance to justify resolution in this Court. *See Rudolph* v. *United States*, 370 U.S. 269, 270 (1962) (certiorari dismissed as improvidently granted where case turned on application of settled law to facts, "and their review would be of no importance save to litigants themselves"). The writ thus need not issue on this ground.

II. The SJC's Decision on the Billboard Editorial and Cartoon Does Not Raise an Issue Worthy of Certiorari.

The Governor also seeks review of whether the SJC erred in finding the editorial and cartoon commenting on his billboard policies to be protected opinion. The Governor's issue concerns an application of Restatement (Second) of Torts § 566 (1977), which at least one Circuit Court of Appeals treats as a matter of state law. *See Avins* v. *White*, 627 F.2d 637, 642 (3d Cir. 1980).[12] The doctrine distinguishes between statements of protected "pure" opinion and potentially actionable "mixed" opinion: the factual basis of "pure" opinion is disclosed or assumed, while "mixed" opinions lack an apparent factual basis and might lead readers to infer false, defamatory facts. *See* Restatement (Second) of Torts § 566 comment b (1977). *See also Pritsker* v. *Brudnoy*, 389 Mass. 776, 778-79, 452 N.E.2d 227, 228-29 (1983). The Governor appears to contend that the SJC erred in holding the cartoon and editorial protected "pure"

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[12] *See also Flotech, Inc.* v. *E. I. DuPont de Nemours & Co.*, 814 F.2d 775, 777 n.2 (1st Cir. 1987) (analyzing question of opinion by reference to state law, where "Massachusetts law is at least as protective as federal law on this issue. . . .")

opinion because "assumed" facts were supplied in a news article the day before. *See* App. 9a.

Notwithstanding the Governor's efforts to find actionable "facts" in an editorial and cartoon, the SJC correctly concluded that a newspaper can comment on events reported the day before. The editorial pointed readers to a readily available news story to obtain factual background. *See* App. 22a. *Cf. Aldoupolis* v. *Globe Newspaper Co.*, 398 Mass. 731, 735, 500 N.E.2d 794, 797 (1986). Readers had no occasion to infer other, undisclosed facts in support of the opinion expressed. Under the principles of § 566, no liability attaches to opinions based on disclosed or assumed facts because it is unreasonable to infer defamatory facts when the factual basis of an opinion is otherwise available. *See, e.g., Pritsker*, 389 Mass. at 781, n.7, 452 N.E.2d at 230, n.7. It is significant that neither the Governor, nor anyone else, has ever sued over the news coverage cited in support of the Globe's editorial opinion.[13]

The SJC's decision was consistent with the decisions of other lower courts in refusing to read a political cartoon literally to embrace an accusation of bribery. In *Keller* v. *Miami Herald Publishing Co.*, 778 F.2d 711 (11th Cir. 1985), the Eleventh Circuit held that a similar cartoon, depicting plaintiff with

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[13] The SJC's holding and rationale are fully consistent with settled principles of Massachusetts law, and decisions of the Circuit Courts of Appeals. In *Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 336, 341, 403 N.E.2d 376, 379 (1980), the SJC held that a newscaster's regular TV appearances formed the assumed factual basis for a satiric comment about his journalistic ability. In *Pritsker*, the SJC rejected petitioner's very argument, that protection for "pure" opinion requires that the public actually have seen the "assumed" facts relied upon by the commentator. 389 Mass. at 781, n.7, 452 N.E.2d at 230, n.7. The decision below simply follows the SJC's holding in *Pritsker*, that opinions may be formed as to any matter "open to the public". 387 Mass. at 781, 452 N.E.2d at 230. *See also Janklow* v. *Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.), *cert. denied*, 107 S. Ct. 272 (1986) (public activities of Attorney General formed basis of protected opinion); *Ollman* v. *Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (political activities and writings of professor appropriate for comment).

money bags, was a figurative expression of the cartoonist's views on a public controversy, *not* an actionable assertion of fact.[14] The lower courts are unanimous, as far as respondents know, in holding that political cartoons are non-actionable for libel.[15] Likewise, editorials are consistently viewed as the classic vehicles for a newspaper's opinions. *See, e.g., Ollman*, 750 F.2d at 986; *Aldoupolis*, 398 Mass. at 734, 500 N.E.2d at 797. The SJC neither created conflict nor strayed from the teachings of this Court in finding the cartoon and editorial protected. Supreme Court review is unnecessary because there is no conflict among lower courts to resolve.

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[14] Precisely because cartoons are *not* read as statements of literal fact, no conflict exists with the Second Circuit's decision in *Cianci* v. *New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980), which involved an outright accusation of rape.

[15] In every case of which defendants are aware, lower courts have held editorial cartoons to be nonlibellous. *E.g., Loeb* v. *Globe Newspaper Co.*, 489 F. Supp. 481 (D. Mass. 1980) (Cuckoo springing from head of plaintiff); *Wecht* v. *PG Publishing Co.*, 510 A.2d 769 (Pa. Super. Ct. 1986) (public official depicted as strange creature possessing undesirable traits, spouting obscenities while in voting booth); *Miskovsky* v. *Tulsa Tribune Co.*, 678 P.2d 242 (Okla. 1983), *cert. denied*, 465 U.S. 1006 (1984) (Plaintiff sucking on sewer pipe; claimed allegation of sodomy); *Yorty* v. *Chandler*, 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970) (strait-jacketed mayor surrounded by orderlies, captioned "I've got to go now . . . I've been appointed Secretary of Defense and the Secret Service men are here!").

Conclusion

Certiorari should issue to review the questions presented in the Petition for Certiorari of the Globe and Farrell. Review is unnecessary, or a summary affirmance warranted,[16] as to the issues raised by the Governor.

Respectfully submitted,

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[16] Summary affirmance, Sup. Ct. Rule 23.1, is appropriate where the lower court's disposition on the merits was obviously correct. *See, e.g., United States* v. *Lane Motor Co.*, 344 U.S. 630 (1953).